UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM H. RUSSO
v.
VETERANS ADMINISTRATION

Docket No.
AT075209031

OPINION AND ORDER

William H. Russo petitioned the Atlanta Field Office of the Merit Systems Protection Board for appeal of his removal as a Nursing Assistant, GS-5, with the Veterans Administration Hospital, Tampa, Florida, based on a charge of patient abuse. The agency founded the charge on its determination that the appellant had cursed, threatened, and pushed a patient during an argument in the patients' dayroom initiated by the appellant's insistence on changing the television channel to watch a basketball game. The appellant alleged that the agency committed harmful error in failing to permit him to confront his accuser during a pretermination hearing; that the agency's removal action was discriminatory because it was partially based on his physical handicap (hearing impairment); that the agency's charge was not supported by the preponderance of the evidence; and that the appellant was the subject of disparate treatment in the imposition of administrative penalties.

In an initial decision issued on November 2, 1979, the presiding official sustained the agency's removal action as promoting the efficiency of the service. The presiding official found that the agency supported its action by the preponderance of the evidence and that the appellant failed to establish harmful procedural error, discrimination, or other disparate treatment on the agency's part. The presiding official found, further, that the penalty of removal was not too severe in view of the fact that the appellant had been counseled three times prior to the incident of abuse at issue regarding his overt hostility to patients, bordering on abuse.

The appellant has now petitioned for review of the initial decision based on allegedly new and material evidence. In the petition, the appellant has asserted the existence of evidence relating to the appellant's disparate treatment allegation, which was not available when the record was closed, despite due diligence.

The appellant had argued before the presiding official that he was treated differently from other agency employees because the

agency representative proposing his removal was biased against retired military personnel who were "double-dippers," like the appellant. He had introduced evidence establishing that another agency employee, who had a sexual encounter with a mental patient on leave from the hospital, had been transferred rather than removed from his position. The presiding official found that the appellant made no affirmative showing of bias in light of the fact that 18-20 similarly retired military personnel were still employed by the agency. The presiding official found, further, that the incident involving another employee's sexual encounter with a patient on leave may well have warranted disparate treatment from the incident of the appellant's verbal and physical abuse of a patient, considering that the former took place off hospital grounds while the employee was off-duty and the patient was beyond the supervision of the hospital.

In his petition for review, the appellant asserted that on the day before the appellant's hearing another nursing assistant with the agency verbally and physically abused a patient, but was only reprimanded. The appellant contended, further, that an agency witness at the hearing on appeal lacked credibility and was likewise culpable of abuse because a few months after proposing the appellant's removal she herself had lost control and verbally attacked a doctor in front of patients regarding the release of a particular patient. Finally, the appellant requested that the Board subpoena the agency's records concerning these two incidents.

In its response to the petition, the agency sought to distinguish both incidents raised by the appellant from the incident involving the appellant. The agency noted that although a patient had complained of abuse by another nursing assistant, the agency's investigation did not substantiate bringing a charge against the employee. The agency argued, further, that the incident between the agency witness and a doctor, who were both agency employees, was irrelevant to the appellant's removal.

As specified by the presiding official in his initial decision, the Board's regulations provide at 5 C.F.R. 1201.115 that the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed, or
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> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Since the appellant's allegations in his petition for review relate only to the former criterion, the Board shall determine whether that requirement has been met.

There is no question whether the two evidentiary submissions are in fact "new" in that they relate to events which could not reasonably have been raised before the presiding official. We will, therefore, concentrate on whether they are both "material," with reference to similar materiality requirements regarding new evidence warranting the reconsideration of the adjudicatory decisions of other administrative bodies as interpreted by the courts.

Section 10(e) of the National Labor Relations Act provides that, when the National Labor Relations Board (NLRB) petitions a U.S. Court of Appeals for an enforcement order, either party to the earlier proceedings before the NLRB may be granted leave to adduce additional evidence upon a showing ". . . that such additional evidence is *material* and that there were reasonable grounds for the failure to adduce such evidence in the (prior) hearing. . . ." 29 U.S.C. 160(e) (emphasis added). This materiality requirement has been interpreted in *National Labor Relations Board v. Serv-Air, Inc.*, 431 F.2d 572, 575 (10th Cir. 1970), to be a "sufficient" degree of materiality.

The regulations of the Department of Health and Human Services' Social Security Administration provide for the reconsideration of an administrative determination where "(n)ew and material evidence is furnished after notice to the party to the initial determination." 20 C.F.R. 404.957 and 404.958. This regulatory provision has been judicially construed in *Leviner v. Richardson*, 443 F.2d 1338, 1343 (4th Cir. 1971), as requiring the reopening of administrative proceedings ". . . where new and material evidence is offered which is of sufficient weight that it may result in a different determination."

Finally, in *Chandler v. Johnson*, 515 F.2d 251 (9th Cir. 1975), *reversed on other grounds*, 425 U.S. 840 (1976), the court refused to reopen the record to permit the taking of more testimony in a proceeding before the Adjudication Division of the Veterans Administration, whose decision was affirmed by the former Civil Service Commission's Board of Appeals and Review. The court noted that ". . . there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened." *Id.* at 255.

Consistent with these court decisions under closely analogous circumstances, the Board concludes that in order to satisfy the "new and material evidence" criterion for granting a petition for review, the new evidentiary submission must be of sufficient weight to warrant an outcome different from that ordered by the presiding official. The two new evidentiary submissions of the appellant shall, therefore, be examined in light of this requirement.

The first submission relates to another alleged incident of physical and verbal abuse by a nursing assistant where the employee was simply reprimanded, not removed like the appellant. The record on appeal contains a 1978 policy announcement of the agency's chief medical director, clearly stating that the administrative penalty for patient abuse is removal and that a lesser penalty may be imposed ". . . only when the abuse is considered to be of a minor nature and is not a repeated offense, or where there are mitigating or extenuating circumstances." The appellant was removed in accordance with this policy. His act of abuse was found by the agency and by the presiding official to be serious and to constitute a repeated offense in light of earlier warnings by the appellant's supervisor; no mitigating circumstances were found. In contrast, the incident involving another nursing assistant's alleged patient abuse could not be substantiated to the extent that the agency believed it could level a charge.

We find that the two incidents are so different that their comparison does not tend to establish the appellant's disparate treatment. The Board concludes, therefore, that evidence regarding the alleged incident of patient abuse by another agency employee would not be of sufficient weight to warrant a finding different from that in the initial decision.

As stated in the petition for review, the second new evidentiary submission relates to the alleged "lack of credibility" of the agency witness who proposed the appellant's removal. That evidence concerns an incident between two employees which has no bearing on disparate penalties imposed in cases of patient abuse. The Board finds that, since this evidence would merely tend to impeach the agency witness's testimony, which was corroborated by the testimony of others, it does not satisfy the materiality requirement for granting a petition for review.

Accordingly, the petition for review of the initial decision dated November 2, 1979, is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than thirty days after the appellant's receipt of the final decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than thirty days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*